No. 16,033

United States Court of Appeals

For the Ninth Circuit

TRADEWIND TRANSPORTATION COMPANY, LIMITED, (Formerly known as Allen Tours of Hawaii, Ltd.),
Appellant,

vs.

BERNICE (TERRY) TAYLOR,
Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellee in the above entitled cause respectfully requests the Court to reconsider its decision entered herein on April 21, 1959 and to grant appellee a rehearing in the above entitled cause on the following grounds:

I.

THE COURT, IN HOLDING THE EVIDENCE INSUFFICIENT, ERRONEOUSLY FOLLOWED THE FEDERAL RULE REQUIRING SUBSTANTIAL EVIDENCE, RATHER THAN THE MORE LIBERAL HAWAIIAN RULE APPLICABLE UNDER THIS, A DIVERSITY CASE.

The court at page 8 as a foundation for holding the evidence insufficient states: "to sustain a jury verdict in the Federal Courts there must be substantial evidence. . . ."

It is conceded that this is the law in the federal courts except in a diversity case under the rule of *Erie v. Tompkins,* 304 U.S. 64. Under the rule of the *Erie* case the sufficiency of the evidence must be tested by state law. The case at bar *is a diversity case.*

Allison v. Tea Company, 99 F. 2d 507 (4th Cir. 1938);

Baskin v. Montgomery-Ward & Company, 104 F. 2d 531 (4th Cir. 1939);

Waldron v. Aetna Casualty, 141 F. 2d 230 (3rd Cir. 1944);

Twin City Company v. Dreger, 199 F. 2d 197 (8th Cir. 1952);

Occidental Life Ins. Co. v. Thomas, 107 F. 2d 876 (9th Cir. 1939).

The rule in Hawaii on the quantum of evidence necessary to sustain a verdict was set out in *Robinson v. Honolulu R. T. & L. Co.,* 20 Haw. 426 at page 431:

> "In some jurisdictions the trial courts are expressly authorized by statute to set aside verdicts and grant new trials 'for insufficient evidence'.

> In those jurisdictions the trial judges have a broader discretion than the circuit judges in this Territory have. Our statute provides that the jury shall be the exclusive judges of the facts in all cases tried before them. R.L. Sec. 1798. In this jurisdiction it is settled that a mere scintilla of evidence is insufficient to support a verdict. *Smith v. Hamakua Mill Co.,* 14 Haw. 669; *Wo Sing Co. v. Kwong Chong Wai Co.,* 16 Haw. 17. *But it has often been held that this court would not set aside a verdict where there was some evidence, i.e., more than a scintilla of evidence, to support it."*

The statute referred to was in force at the time of the trial of this case and is presently *Section 212-14 Revised Laws of Hawaii 1955.* It provides that there shall be no reversal "for any finding depending on the credibility of witnesses or the weight of the evidence. . . ." See also *Makainai v. Lalakea,* 25 Haw. 470; *Louis v. Victor,* 27 Haw. 262; *Solomon v. Niulii Ltd.,* 32 Haw. 865.

It is apparent from an analysis of this court's opinion in the instant case that the court weighed the credibility of Pagay and considered the weight of all the evidence. At page 5 of the opinion the court comments on the fact that Pagay was not an unfriendly witness. The court then goes on to quote in the body of its opinion testimony of Pagay unfavorable to appellee and in footnotes quotes testimony favorable to appellee. The court has obviously weighed the favorable and unfavorable testimony and given greater weight to the cross-examination of

Pagay while the jury apparently gave greater weight to the direct. In this the court erred. The view of the evidence most favorable to the prevailing party must be accepted in considering whether the testimony of a witness or party will support a verdict. It is for the jury to determine what weight must be given to the direct and cross-examination and the testimony of a witness as a whole. *Clark v. Torrington,* 63 A. 657, 79 Conn. 42; *Mathis v. Tutweiler,* 295 F. 661; *Gardiner v. Courtright,* 130 N.W. 322, 165 Mich. 54.

In *Johnson v. Union Pacific*, 233 F. 2d 427, 249 F. 2d 674, 352 U.S. 957, this court was reversed for setting aside a verdict on the basis of a misinterpretation by it of Idaho law. In the instant case the court did not inquire what the law in Hawaii was and the question was not briefed for the court. It is apparent from an analysis of Hawaii Supreme Court opinions dealing with the sufficiency of the evidence that the Supreme Court of Hawaii would not have set aside the verdict in the case at bar. In *Holstein v. Benedict,* 22 Haw. 441 at page 445, the court said:

> "Each case must turn upon its own circumstances, and we are not prepared to say that in every case where in the opinion of the appellate court, the evidence in support of a claim is very slight and unsatisfactory, it is to be regarded as an insufficient foundation for a verdict."

II.

THE COURT ERRONEOUSLY, EVEN UNDER THE FEDERAL RULE, WEIGHED THE EVIDENCE AND THE CREDIBILITY OF WITNESSES, IN DETERMINING THE SUFFICIENCY OF THE EVIDENCE.

Even if this court should conclude, contrary to the authorities cited in I above, that the federal substantial evidence rule applies in the instant case, its prior holdings would not justify a reversal of the judgment herein.

The weight of evidence, including all factors of credibility which do not render testimony incredible as a matter of law, is beyond the scope of appellate review of jury verdicts. *Bryson v. U. S.*, 238 F. 2d 657 (C.A. Cal. 1956).

The weight and credibility of evidence are solely within the jury's province to determine and matters as to which the reviewing tribunal has no right to inquire. *Bridgman v. U. S.,* 183 F. 2d 750 (C.A. Cal. 1950).

Court of Appeals cannot weigh evidence. *Chin Bick Wah v. U. S.*, 245 F. 2d 274 (C.A. Cal. 1957).

Court of Appeals cannot disturb a jury's resolution of conflicts in evidence. *S. Birch & Sons v. Martin,* 244 F. 2d 556 (C.A. Alaska, 1957).

In *Stone v. Farnell*, 239 F. 2d 750 (C.A. Cal. 1956), this court held that it *must* view the testimony in the light most favorable to the prevailing plaintiff. See also *Sandez v. U. S.*, 239 F. 2d 239 (C.A. Cal. 1956).

III.

SINCE THE PURPOSE OF PAGAY'S TESTIMONY WITH REGARD TO PRIOR SLIPS WAS TO ESTABLISH NOTICE, THE COURT ERRED IN HOLDING THAT SUCH EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE VERDICT.

Plaintiff in the instant case relied on the testimony of the expert witness Ebert to establish the dangerous condition of the premises involved. The testimony of the witness Pagay with regard to what he had observed prior to the Taylor accident *was offered to establish notice* rather than to establish a dangerous condition.

It is significant that the court reversed on the sole ground that "the evidence was insufficient to bring such knowledge (dangerous condition) to appellant (Tradewind)" p. 8 of opinion. The court in the preceding paragraph erroneously paraphrased the trial court's instruction on this point as follows: "In order for there to be a recovery against appellant, there must be proof . . . that Tradewind knew that the condition . . . constituted a dangerous condition. . . ." Actually, the instruction given by the trial court, (p. 4 of opinion), authorized a verdict for plaintiff if defendant (Tradewind) *or its authorized employee* (Pagay) had actual knowledge of the condition. Pagay's testimony establishes clearly that he had such knowledge prior to the accident and the court must accept his testimony as true under the cases cited above.

In this connection see two recent cases, *Laird v. Mather,* 331 p. 2d 617 (S. Ct. Cal. 1958) and *Evans v. Penn. Railroad,* 255 F. 2d 205 (3rd Cir. 1958).

In the *Laird* case the vice-president of the defendant company had been told someone had slipped on the stairway involved. There was no direct testimony of anyone who had observed the slip. The court held that where the purpose of the offered evidence is to show notice, the strict requirement of similarity of conditions is relaxed, and all that is required is that previous accidents have been such as to attract defendant's attention to the dangerous situation which resulted in the litigated accident. The court said at page 623:

> "If believed, the testimony would support a finding that defendant was aware that the handrail presented a hazard to the users of the stairway. It was, therefore, relevant and admissible not to show that someone actually fell, but to show defendant's knowledge of the dangerous condition of the stairway."

In the case at bar the evidence on the issue of notice was properly admitted and sufficient to sustain the verdict under the law of Hawaii. This court in finding the evidence insufficient apparently (1) applied the incorrect rule as to quantum of evidence and (2) erroneously concluded that the testimony of Pagay was offered to establish a dangerous condition rather than to show notice.

CONCLUSION.

For the reasons stated above, appellee requests the court to grant its petition for rehearing and reargument of the case with regard to the specific issues set forth in this petition.

Dated, Honolulu, Hawaii,
May 6, 1959.

Respectfully submitted,
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Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that in our judgment the foregoing petition for a rehearing is well-founded and that it is not interposed for delay.

Dated, Honolulu, Hawaii,
May 6, 1959.

KENNETH E. YOUNG,
DAVID N. INGMAN,
Attorneys for Appellee and Petitioner.